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CHARLES ELMORE

No. 383

Supreme Court of the United States

OCTOBER TERM, 1934.

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Comes now G. D. Swinson, the above named petitioner, and respectfully shows to this court:

1st: That the only question involved in this case is whether a railway employee can recover if he is injured because of the giving way of a grabiron at the end of a railway tank car when plaintiff had his foot thereon, the railroad company admitting that there would be liability if he had his hand on the grabiron, but claiming there would be none when he had his foot thereon.

2nd: That heretofore petitioner commenced, and there was tried in the United States District Court, District of Minnesota, Fourth Division, an action under the Federal Employers' Liability Law against the respondent, wherein plaintiff sought to recover damages from respondent because

of a crushed foot, which was caused by the violation, by the railway company, of the Safety Appliance Acts of the United States pertaining to grabirons and running boards, these acts providing:

AS TO RUNNING BOARDS.

"All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and *secure running boards* shall be equipped with *such* ladders and *running boards*."

Act of April 14, 1910, Ch. 160, Sec. 2, 36 Stat. 298, Title 45, Sec. 11.

The defendant, under the facts in this case, violated the statute both as to running boards and as to ladders and handholds. The complaint alleged that the defendant "did have upon said railway tank car a *running board, ladder and handhold* which were rotten, loose, broken, defective and insecure."

GRABIRON—HANDHOLD STATUTE.

The original Safety Appliance Act, being the Act of March 2nd, 1893, provides as follows:

"It shall be unlawful for any railroad company to use any car in Interstate Commerce that is not provided *with secure grabirons or handholds* in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

3rd: That at the close of the trial of said action the court directed a verdict in favor of defendant; that an appeal was taken to the Circuit Court of Appeals of the Eighth Circuit, which court sustained the lower court; that judg-

ment was entered in the Circuit Court of Appeals on the 2nd day of August, 1934, and that it is to review such judgment that this petition is presented.

4th: That said judgment of the Circuit Court of Appeals is final, and that the same is erroneous, and that this Honorable Court should require this cause to be certified to it for review and determination pursuant to law.

5th: That the claim of petitioner was founded on the Federal Employers' Liability Law, it being conceded that petitioner and respondent were, at the time petitioner was injured, engaged in Interstate Commerce; that the right of recovery of petitioner was further based upon the Safety Appliance Acts of Congress, heretofore quoted.

BRIEF SUMMARY OF FACTS INVOLVED.

Swinson was a brakeman. He was working about a railway oil tank car. This car was surrounded by a platform, upon which employees might work, and walk and be about, as necessity required. On the 17th day of September, 1932, at Mitchell, South Dakota, petitioner was attempting to release a brake which had been tightly set on this oil tank car (R. 5-6).

At the end of the car, and projecting horizontally, was a metal grabiron. This was near the center of the car, as was the brake. The grabiron, or handhold, was from eighteen to twenty inches long, was fastened to the running board, and extended out horizontally from two and one-half to four inches beyond the running board (R. 10).

Petitioner could not release the brake, which was tightly set, without getting a "purchase," which he did, by placing his foot on the grabiron. This he did, in attempting to re-

lease the brake, and when he stepped upon the grabiron, one end of the same pulled through the running board, gave way, and threw him to the rails, causing a crushing of his foot, which was later amputated (R. 6-7).

The petitioner claimed that an absolute duty rested upon the railway company to maintain this grabiron and running board in a secure condition.

It is *undisputed* that the grabiron did give way, and did pull out of the running board and that petitioner was injured because of this.

The railroad company, respondent, claimed that because petitioner put his *foot* on the grabiron instead of his *hand*, that he could not recover, and that he was not "within the *class*" for whose benefit the statute was enacted, although he was a *railway brakeman*.

The trial court accepted this view and directed a verdict against petitioner.

Petitioner, in the trial court, showed, by *nine* witnesses, that the use to which the appliance was put, was one of the *ordinary, normal* and *customary uses* thereof. Petitioner showed that placing the foot on the appliance was common, was customarily done in various railroad yards, and by various railroad employees, and that plaintiff was within the class intended to be protected by the statutes.

Respondent introduced evidence tending to show that this was not the fact.

The Circuit Court of Appeals of the Eighth Circuit upheld the trial court on the theory that petitioner could not recover because he put his *foot* on the instrumentality, although he could have recovered had it given way when he had his *hand* thereon.

The Circuit Court said:

> "We do not find that the precise question *has been decided by the Supreme Court,* and *until it is,* there is bound to be some *uncertainty* as to the correct rule to apply to this situation."

The absolute requirements of the Safety Appliance Acts as to grabirons, handholds and running boards necessitated maintaining the same in a safe and secure condition. The use to which the same was put was a customary and common use, and the Safety Appliance Acts were applicable. Because of their violation petitioner was injured, such violation being a proximate cause of the injury.

That a more complete statement of the facts, and the action of the Circuit Court of Appeals, to review whose judgment this petition is made, appears in the brief in support of this petition, which is hereto annexed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The writ of certiorari should be granted in this case for the following reasons:

1st: The decision of the Circuit Court of Appeals is erroneous.

2nd: The Circuit Court of Appeals said:

> "We do not find that the precise question has been decided by the Supreme Court, and, until it is, *there is bound to be some uncertainty as to the correct rule* to apply to this situation."

3rd: The decision of the Circuit Court of Appeals is inconsistent with the decisions of other Circuit Courts of

Appeal and is inconsistent with the decisions of the Supreme Court of the United States in *Louisville & Nashville R. R. Co. vs. Layton*, 243 U. S. 617, 61 L. Ed. 931 and *Davis vs. Wolfe*, 263 U. S. 239, 68 L. Ed. 284.

4th: The Circuit Court of Appeals misconstrued the Safety Appliance Acts and held applicable the cases of *Lang vs. New York Central Ry. Co.*; 255 U. S. 460, 65 L. Ed. 731 and *St. Louis and San Francisco Ry. Co. vs. Conarty*, 238 U. S. 248, 59 L. Ed. 1290, when the controlling rule was laid down in *Davis vs. Wolfe*, 263 U. S. 239.

5th: The Circuit Court of Appeals erred in holding that petitioner was "not within the class" intended to be protected by the Safety Appliance Acts. The class intended to be protected consisted of brakemen, switchmen, conductors and men working about railway cars. Swinson *was* a brakeman. He was within the class. The nearest thing to a justification of the position of the Circuit Court of Appeals would be a statement that while petitioner was within the class intended to be protected, he "stepped out of character" when he had his foot on the grabiron instead of his hand.

6th: The Circuit Court of Appeals erred when, in its opinion with reference to the grabiron, it said:

> "We are convinced, however, that this handhold was not intended for use in the way it was used by Swinson, nor was it suitable for such use, nor was the defendant required to anticipate that it would be so used."

This is not correct because nine witnesses testified for petitioner that the grabiron, as he used it, was used in one of the ordinary, usual and customary ways in which such grabirons are used in railroad service.

There was no evidence tending to show what use Congress "intended" should be made of the handhold.

7th: The Circuit Court was in error in thus holding:

> "We think this case *must* be dealt with on the basis that *the handhold was defective* as a handhold, that its giving way *caused Swinson to fall,* but that, at the time he was using it, he was using it in a way and for a purpose for which it was not intended or required, and that the accident was not one which might reasonably be expected to happen from a *failure* to *furnish* or to *maintain a secure end handhold.*" The *statutes* do not *limit* the running board or grabiron to use by the hand.

8th: The Circuit Court was in error in holding:

> "It was not required to anticipate that any such use would be made of the appliance, and, by using it in a manner not intended or contemplated, he placed himself *in a class for whose benefit the law was not enacted,* and, under the circumstances, the delinquency of the defendant was *not the proximate cause* of his injury."

Such rule justifies having an insecure grabiron on the car,—a penalty defect.

The court erred in this holding because it appeared from the evidence by nine witnesses that the use made of the grabiron was one of the *ordinary* and *customary* uses.

9th: The Circuit Court erred in failing to apply the doctrine of *Davis vs. Wolfe, supra.*

10th: The Circuit Court erred in holding that the case of *Chicago, Milwaukee Ry. Co. vs. Kellogg,* 94 U. S. 469, was authority for the granting of a directed verdict in this case, on the question of proximate cause, because the Kellogg

case holds that the question of proximate cause is to be determined by a jury.

11th: The Circuit Court erred in holding that the Safety Appliance Act as to grabirons had not been violated so as to give petitioner a right of recovery.

12th: The Circuit Court erred in holding that the Safety Appliance Act as to running boards had not been violated, so as to give petitioner a right of recovery.

13th: The Circuit Court erred in holding that even though the violation were proven, plaintiff, *a brakeman*, was "not within the class" intended to be protected by the Safety Appliance Statutes.

14th: The writ should be granted because the question involved is one of importance to thousands of railway employees in the country.

15th: The writ should be granted that the law might be settled, so that if petitioner's contention be wrong, legislation may be enacted to give protection to railway men injured by defective safety appliances while doing their work in the ordinary, usual and customary manner, as shown by the evidence of nine witnesses for petitioner.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, commanding that court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and proceedings of the Circuit Court of Appeals in said cause, being No. 9965, and entitled *G. D. Swinson vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company,* and that said

judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other relief in the premises as to the court may seem proper. And your petitioner will ever pray.

G. D. SWINSON,
Petitioner.

TOM DAVIS and
ERNEST A. MICHEL,
His Counsel.

Supreme Court of the United States

OCTOBER TERM, 1934.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED NEVER DIRECTLY DECIDED.

Error was committed when Swinson was denied recovery because he had his foot on the grabiron when it gave way.

The claim of the railroad company was that Swinson had no right to put his foot on the grabiron; that there was no liability because he had his *foot* on the grabiron when it gave way, instead of his *hand.*

Decisions in point on principle, are, among others: *Louisville & Nashville Ry. Co. vs. Layton,* 243 U. S. 617; *Minneapolis & St. Louis Ry. Co. vs. Gottschall,* 244 U. S. 66; *Davis vs. Wolfe,* 263 U. S. 239 and *The Fairport, Paynesville & Eastern Ry. Co. vs. Meredith,* 54 S. Ct. 826.

Under the doctrine of these four cases, the decision of the Circuit Court of Appeals of the Eighth Circuit is wrong.

Duty Under Safety Appliance Acts Absolute.

It is not questioned that there is an absolute duty under the Safety Appliance Acts pertaining to grabirons or handholds and running boards. The statutes have been quoted in the petition, and in the interest of brevity, will not be quoted again.

The Circuit Court recognized the absolute duty devolving on the carrier, saying that it "was under the absolute duty of maintaining this handhold in a secure condition for the purpose for which it was intended, and that any employee who, while using it for its intended purpose, was injured as a result of its being defective for that purpose, could recover."

Within the Class.

But the Circuit Court said the petitioner was not within the class entitled to the benefits of the act. In this the court clearly erred.

The *class* intended to be benefited included railway brakemen. Petitioner *was* a railway brakeman. The most that could be said to sustain the contention of the court would be to say that although petitioner was within the class, that in the particular work being done at the time, he so conducted himself as to be removed from the protection intended for the "class."

It is erroneous to say that *brakemen* were *not* within the class intended to be protected by the Safety Appliance Acts.

Act Liberally Construed.

The grabiron act provides that cars should have secure grabirons "for greater security to men in *coupling or uncoupling* cars."

The carriers first contended that there could be no recovery unless men were *actually engaged in coupling operations.*

The general rule enunciated by the courts is that where a safety appliance fails to function or is defective and an employee is injured by reason thereof, he may recover although he was *not engaged in an operation in which the appliances were designed to furnish him protection.*

> "That there is no inconsistency between this conclusion and the repeated declarations of the Supreme Court in earlier cases to the effect that the evil sought to be remedied by the enactment of these statutory requirements as to coupling facilities was the risk of coupling and uncoupling, is at once apparent when it is considered that in such declarations the term, 'risk of coupling and uncoupling,' is used in a historical sense, and refers to those risks which existed prior to the use of the appliances required by the statutes and orders now in force. The protection afforded by these statutes, on the other hand is present and prospective. *The shield of the statute is raised over every employee who, in discharging duties in the course of his employment, although not engaged in an operation in which the safety appliances are specifically designed to give him protection, is put in peril by the failure of any such appliance, designed to eliminate or minimize the risks of coupling or uncoupling, to perform its appointed function.* He has the protection of the statute *whenever* a

breach of its terms occurs, and the risk of an injury consequent upon such breach is by virtue of the statute transferred from him to the carrier; but not until injury causally related to such breach occurs does the remedial force of the statute become effective."

Roberts Federal Liabilities of Carriers, 2nd Edition, Volume 2, pages 1358-1359.

In *McNaney vs. Chicago, R. I. & P. R. Co.,* 132 Minn. 391, 157 N. W. 650, plaintiff was injured when he attempted to board a caboose which had a loose grabiron. There was another issue of negligence submitted to the jury not here material. Judge Holt, who wrote the opinion in that case, stated the questions for consideration by the court to be the following:

"The main ground upon which defendant predicates the right to a new trial is (a) that the insecure grabiron which is claimed to have occasioned the fall is not one of the safety devices demanded by the Federal Safety Appliance Act, either as originally passed or as amended and supplemented and (b) that plaintiff, when injured, was not engaged in coupling, in the doing of which work, *and that alone,* the act assured to him the use of safe grabirons. If either contention be right a new trial is inevitable."

In this case the evidence did not show that the use of the handholds was confined "to having hold thereof while walking along the car to couple or uncouple."

After referring to the Safety Appliance Act of 1893 and the amendment of 1910, Justice Holt said:

"Taking the safety appliance acts as now in force, and giving them a construction which will secure to

men *in the extremely perilous work of brakemen* and switchmen the protection intended, we think it should be held that every handhold, step, ladder and running board designed for their support in the *necessary work of operating trains,* must be secure. That being the case, we deem the grabiron here involved covered by the acts mentioned."

Nine witnesses testified as to such "necessary work," saying the work and use of the grabiron by Swinson was usual and customary.

In *Clapper vs. Dickinson,* 137 Minn. 415, 163 N. W. 752, plaintiff was injured while attempting to place a block under a car to prevent its further movement. Because of a defective coupling appliance on another car which had failed to couple automatically by impact, the car about which Clapper was working and attempting to block was caused to be knocked onto and against him, injuring him. He claimed that the previous violation of the Safety Appliance Act caused his injury.

Chief Justice Brown wrote the opinion for the Supreme Court of Minnesota and said:

"The principal *claim* of defendant is that the defect in the coupler and its failure to work, even though the result of defendant's negligence *is not a matter of which plaintiff can complain.* This contention is based upon the rule of general application, that where a statute is enacted for the benefit and protection of a *particular class,* in order to complain of a violation thereof an injured party must bring himself *within that class.* And the precise point is, that since plaintiff at the time of his injury was not engaged in coupling the cars together, he is *not within the class* for whose protection

the Federal Act was intended, and cannot therefore complain of the defect. Authorities are cited in support of the point. *Johnson vs. Southern Pac. Co.,* 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *U. S. vs. Louisville & N. R. Co.,* 162 Fed. 185; *Hohenleitner vs. Southern Pac. Co.,* 177 Fed. 796; *Burho vs. Minneapolis & St. L. R. Co.,* 121 Minn. 326, 141 N. W. 300. Counsel for defendant presented the case in the court below *upon that theory of the law.* But since the trial of the action and since the preparation of their brief in this court, the Supreme Court, the final authority upon all questions as to the construction of the Federal Safety Appliance Act, *has put the question entirely at rest* by a decision adverse to the contention here made. *Louisville & N. R. Co. vs. Layton,* 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931. In that case the court held that an interstate railway carrier is liable in damages to an employee injured in the discharge of his duty, *regardless of the position he may have occupied at the moment he was injured,* where the carrier's failure to obey the automatic coupler requirements of the Federal Safety Appliance Acts is the proximate cause of his injury. In that case as in the case at bar the employee was not engaged in attempting to effect a coupling of the cars when injured, but the jury found in each that the defect in the coupling was the proximate cause of the injury. We, therefore, follow and apply the rule announced by the Layton case."

The opinion in the Minnesota case above cited follows the opinion of the Supreme Court of the United States in *Louisville & N. R. Co. vs. Layton,* 243 U. S. 617, wherein the court said:

"While it is undoubtedly true that the *immediate occasion* for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written *are by no means confined in their terms to the protection of employees only when so engaged.* The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law, springs from its being made unlawful to use cars not equipped as required —not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty."

Not the Intention But the Use.

The Circuit Court of Appeals held that it was not *"intended"* that this grabiron should be used by the foot; that the *brakeman* was not "within the class" intended to be protected.

The grabiron was a heavy piece of iron, fastened onto a heavy oak plank, forming a part of the running board around the tank car.

If in condition—if the running board were not rotten, if the handhold or grabiron were not defective—it would be strong enough to stand the strain of many men thereon. The weight or strain from a man using his foot in operating

the brake would not be appreciably more than the strain placed upon the grabiron if a man should use it to swing himself over the draw bars and between the cars.

The Layton case, *supra*, settled the question of liability, but it was re-affirmed by this court in *Davis vs. Wolfe*, 263 U. S. 239, wherein it was said:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not *a* proximate cause of the accident which results in such injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, *he can recover* if the failure to comply with the requirements of the act is *a* proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*"

It will be noted that the court said that a failure to comply with the requirements gives a right of action, if the failure is *a* proximate cause of the accident.

In the case at bar there was a failure to comply with the requirements of the statutes. This failure injured petitioner. It was the proximate cause. It cannot be said it was not the proximate cause except by resorting to legal sophistry, because the grabiron pulled out of the rotten running board and this caused the injury to Swinson.

The Davis case lays down the rule but it was not followed by the Circuit Court.

That the Safety Appliance Acts are to be liberally construed and not restricted clearly appears from the recent

decision of this court in the case of *Fairport, Paynesville & Eastern Ry. Co. vs. Meredith*, 54 S. Ct. 826.

USE TO WHICH INSTRUMENTALITY PUT.

In *Lehigh Valley R. Co. vs. Howell*, 6 Fed. (2d) 784, it appeared that the servant took hold of a hand brake to assist him in climbing onto a car. The hand brake was defective and the servant was injured. He claimed a right to recover under the Safety Appliance Act but the railroad contended that the appliance was not being used *in the manner intended* and that, therefore, the case did not come within the Safety Appliance Statute.

The court, after referring to many cases, said:

> "If the brake was *incidentally used* in going to the point where the brake was to be released by turning the hand wheel, it was within the section. We think the defendant in error was entitled to invoke the Safety Appliance Act in imposing liability for the injury which he sustained under the circumstances here disclosed."

In *Chesapeake & Ohio R. Co. vs. Smith*, 42 Fed. (2d) 111, it appeared that a rear brakeman was riding a caboose. The head brakeman erroneously threw a wrong switch and as the cars proceeded down the wrong track, the air suddenly "went on." One car was found to be off center, three cars from the caboose. When the air "went on," plaintiff was thrown and injured. There was no evidence to show what made the brake go on. Plaintiff claimed a right of recovery under the Safety Appliance Act. A recovery was upheld by the Circuit Court of Appeals for the 6th Circuit, Mack, Circuit Judge, in the opinion, saying:

> "And, even though plaintiff, at the time of the acci-

dent, was not engaged in an operation in which the safety appliances are *specially designed to furnish protection*, the failure to comply with the acts *may nevertheless be the proximate cause of the injury. Louisville & Nashville R. R. vs. Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; *Davis vs. Wolfe*, 263 U S. 239, 44 S. Ct. 64, 68 L. Ed. 284. This issue was submitted to the jury under a proper charge"

The Lang and Conarty Cases.

The Lang case, 255 U. S. 460, and the Conarty case, 238 U. S. 248, have been relied upon by the carriers to defeat liability in many cases. These decisions are inconsistent with the *Layton*, 243 U. S. 617 and the *Davis vs. Wolfe* case, 263 U. S. 239. They were distinguished in the Davis case, but are still relied upon by carriers, although not here in point. These decisions have brought about much confusion and being inconsistent with the final authority, *Davis vs. Wolfe*, 263 U. S. 236, should be definitely overruled.

The Circuit Court applied the rule of the Lang case instead of the rule of the later Davis case.

The Intention of Congress.

The Circuit Court decided the present case on the theory that the Act of Congress was *not intended to protect brakemen* working as Swinson did.

Nine competent, experienced railroad men testified that the use plaintiff made of the grabiron was one of the usual, ordinary and customary uses to which the same was put.

There was no evidence as to what Congress intended in passing the act, save the general and inescapable inference

that Congress desired to protect the employees and the public. It is a certainty the act was not passed to protect employers.

Congress did not impose *any limitation* upon the applicability of the act, nor did the Supreme Court in the Layton and Davis cases.

Neither did the Circuit Court of Appeals of the Second Circuit impose such limitation in the Howell case, 6 Fed. (2nd) 784.

It was not imposed by the Supreme Court of Minnesota in *McNaney vs. C. R. I. & P. Ry. Co.,* 132 Minn. 391, 157 N. W. 650, which case has been frequently cited with approval by various Circuit Courts and by this court.

Railroad trains are made up of engines, box cars, tank cars, etc. Upon these trains are many appliances, grabirons, handholds, couplers, running boards, platforms, etc.

The use of these appliances has never been restricted nor limited.

When a railroad man goes between two box cars, he necessarily steps onto the draw-bar or coupling apparatus, and thus finishes his "jump across."

The coupling apparatus was not intended as a "stepping stone" for men going between cars, but it is customarily so used.

A brake staff is customarily used as a handhold, as shown in the Howell case, *supra.*

There is no rule of the Interstate Commerce Commission showing the intent or purpose, nor restricting the use of an end grabiron.

This end grabiron is made of substantially the same kind of iron, of the same size and strength, fastened with the same kind of bolts and nuts, attached in practically the same way as a side ladder or handhold.

There was no evidence tending to show that the strain upon this grabiron, because Swinson put his foot thereon was so great that, if in good condition, the grabiron could not stand it. As a matter of common knowledge, this grabiron, fastened onto this heavy oak plank, by the means disclosed in the evidence, would stand a strain much greater than it would be subjected to if a man stepped on it. If it were in good condition, it would not give way if a brakeman stepped on it. Furthermore, *he could not force it* to give way by any pressure he could exert thereon with his foot (Lush, 55).

The Minnesota Supreme Court in the Frye case took the position, in effect, contended for here.

See *Frye vs. Chicago, Rock Island & Pacific Ry. Co.*, 157 Minn. 52; 195 N. W. 629.

ERRORS OF CIRCUIT COURT.

The Circuit Court fell into the fundamental error of holding that the act did not intend protection to this brakeman.

It is not the intention, but it is *the use to which the appliance is put* which governs liability, under the Layton and Davis cases, and the other cases cited herein.

It must be remembered that nine men—practical railroad workers, testified that the use Swinson made of this grabiron, fastened to the rotten running board, was one of the *ordinary, usual and customary uses to which such appliances were put.*

The Circuit Court, in the opinion, said that if the handhold was inadequate "for its intended purpose" liability would follow.

Who determines the "intended purpose"?

Congress made no specification or direction. Congress said

the handhold, or grabiron and the running board, must be secure. It said nothing about intent.

While there was a limitation in the grabiron statute, "for greater security to men in coupling and uncoupling cars," this court held this limitation was not controlling.

It will be judicially assumed that handholds or grabirons on the sides of box cars are used by the men in climbing the cars; that they are used by both the hands and feet. If one of these grabirons gave way when a plaintiff had his foot thereon, liability would follow.

Liability could not be prevented by calling the grabiron a handhold, and saying the intention was only to protect employees when they had their hands on the grabiron and not when they had their feet thereon.

The same thing applies in the case at bar, where the nine witnesses testified as to the customary use of the appliance. The record does not show that such use has ever been prohibited.

The Circuit Court said that the handhold was not intended for use as Swinson used it. Nine witnesses said it was.

The witness Irwin said:

> "I have had occasion to switch and set brakes and release brakes on tank cars of this kind and type. I have seen hundreds, I believe, in my experience of cars similar to the car in question, where the handhold would be out horizontally. I have used this grabiron or foot step and it is customarily used to grab hold of one car and grab the other—swing yourself up on the drawbar and get over to the car; it is customarily used to step on and step over to the other car, because of the distance between the cars. It is customarily used to put your right foot on when you are letting off a brake

that is set rather tightly. Your left foot is put into position to operate the dog that catches the ratchet on the brake staff. I have seen other railroad men use this horizontal grabiron in releasing brakes."

Also the witness Lush said:

"The usual practice is for a man to step from the running board and lean over and take hold of the brake wheel with your right hand and step on the grabiron with your left foot and then take hold of the railing that runs around the top of the tank. There is nothing particularly dangerous about that and I have done it and seen it done by others thousands of times and have never heard of a man being injured doing it" (R. 54).

As to the use of the grabiron, the witness Murphy said:

"I have done it many times, and have seen other railroad men do it" (R. 57).

The witness McFarland said:

"I have seen this done hundreds of times" (R. 58).

The witness Williams said

"that if the brake was set tight, it would have to have more leverage to let it off so the only place you had was the grabiron; it has been the common practice to use it" (R. 58).

To the same effect is the testimony of all plaintiff's witnesses.

But it is not necessarily the *intended* use, as pointed out in the Layton and McNaney cases, but it is *the use to which the same was put.*

The Circuit Court says that the railroad company was not "required to anticipate that it would be so used."

The evidence shows, by the nine witnesses, that the use was an ordinary, usual and customary one, as did Swinson, so the company *actually knew it* and there was no question of "anticipation."

The Circuit Court further said this device would furnish an insecure foothold to a man setting a brake. There is no conclusive evidence of this, and the plaintiff, petitioner herein, testified that the use of the grabiron would give him a better and a more secure foothold.

The Circuit Court further said that "the handhold was defective as a handhold; that *its giving way caused Swinson to fall.*" (Certainly proximate cause.)

The court, however, said that he was not using it for the intended purpose.

It is to be noticed that the court said that the defective handhold "caused Swinson to fall." If this be so, the defect *was* the proximate cause of the accident, and under the Layton case, the Gottschall case and the *Davis vs. Wolfe* case, plaintiff was entitled to recover.

On the question of proximate cause, the Circuit Court cited the Kellogg case, 94 U. S. 469, but failed to quote therefrom that portion of the opinion which holds that proximate cause is practically always a question for the jury.

It cannot be properly said that when an appliance upon which an employee steps gives way because of a defect, such defect is not the proximate cause of the accident.

The Circuit Court said the running board statute was not urged. It was set forth in appellant's brief, and the claim thereunder was never abandoned and is not now abandoned.

THE GENERAL RULE.

Text book writers say that there should be a recovery under the circumstances in such a case. We quoted from Roberts, a recognized authority heretofore.

Roberts Federal Liabilities of Carriers, 2nd Edition, Volume 2, pages 1358-1359.

CONCLUSION.

The Circuit Court of Appeals erred in failing to follow the Layton case, the Davis case, the McNaney case and the Howell case.

The court was clearly in error in saying that a brakeman was not "within the class" intended to be protected by the act.

The Circuit Court was also in error on the question of proximate cause.

While the general principles have been heretofore determined by this court, and *contrary* to the decision of the Circuit Court, the precise question has not been passed upon.

The question should be determined because the matter is of importance to thousands of railroad men in the country. It involves an interpretation of the Federal Statutes as to handholds and running boards. Basically and fundamentally and as a proposition of general law the decision of the Circuit Court of Appeals is erroneous. A writ of certiorari should be granted to correct and clear up this wrong.

Respectfully submitted,

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